No. 80-1420

MAR 25 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNCLE BEN'S, INC.

Petitioner,

v.

THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JERRY D. ANKER
RANDALL L. SPECK
SUE M. BRIGGUM
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 828-1306

Counsel for Respondent, Thomas Johnson

Of Counsel:

CAROLE NELKIN
NELKIN & NELKIN
5417 Chaucer
P.O. Box 25303
Houston, Texas 77005
Telephone: (713) 526-4500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below correctly applied the disparate impact theory to an employment promotion system in which subjective evaluations were coupled with promotion criteria that were facially neutral but racially discriminatory in effect?
2. Whether the Court below correctly identified the district court's errors in applying controlling legal principles regarding the role of statistics in an employment discrimination case?
3. Whether the Court below correctly remanded judgment to the district court with instructions to consider additional evidence in order to determine whether internal workforce data or external labor market data accurately defines the relevant labor pool?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. THE FIFTH CIRCUIT CORRECTLY APPLIED THE DISPARATE IMPACT THEORY TO AN EMPLOYMENT PROMOTION SYSTEM IN WHICH SUBJECTIVE EVALUATIONS WERE COUPLED WITH PROMOTION CRITERIA THAT WERE FACIALLY NEUTRAL BUT RACIALLY DISCRIMINATORY IN EFFECT	4
II. THE FIFTH CIRCUIT CORRECTLY IDENTIFIED THE DISTRICT COURT'S ERRORS IN APPLYING CONTROLLING LEGAL PRINCIPLES REGARDING THE ROLE OF STATISTICS IN AN EMPLOYMENT DISCRIMINATION CASE	8
III. THE FIFTH CIRCUIT CORRECTLY REMANDED JUDGMENT TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONSIDER ADDITIONAL EVIDENCE IN ORDER TO DETERMINE WHETHER INTERNAL WORKFORCE DATA OR EXTERNAL LABOR MARKET DATA ACCURATELY DEFINES THE RELEVANT LABOR POOL	11
CONCLUSION	12

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	7
Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975)	7
Dothard v. Rawlinson, 433 U.S. 321 (1977)	4
EEOC v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979)	5
EEOC v. United Virginia Bank/Seaboard National, 555 F.2d 403 (4th Cir. 1977)	10
Fisher v. Procter & Gamble Manufacturing Co., 613 F.2d 527 (5th Cir. 1980) (U.S. appeal pending)	8
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	4, 7
Guardians Ass'n of New York City v. Civil Service, 630 F.2d 79 (2d Cir. 1980)	7
Hazelwood School District v. United States, 433 U.S. 299 (1977)	8
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	4, 6, 8
James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978)	5, 6, 7, 10
Lewis v. Tobacco Workers' International Union, 577 F.2d 1135 (4th Cir. 1978), cert. denied, 439 U.S. 1089 (1979)	10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	6
Nath v. General Electric Co., 438 F. Supp. 213 (E.D. Pa. 1977), aff'd., 594 F.2d 855 (3d Cir. 1979)	7
Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979)	6, 10
Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir.), cert. denied, 439 U.S. 835 (1978)	7
Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976), modified, 544 F.2d 1258, cert. denied, 434 U.S. 822 (1977)	5, 7

TABLE OF AUTHORITIES—Continued

	Page
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972)	5, 6, 8
Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979)	5
Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980)	5, 8
Texas Department of Community Affairs v. Burdine, 49 U.S.L.W. 4214 (March 4, 1981)	6
United States v. County of Fairfax, Virginia, 629 F.2d 932 (4th Cir. 1980)	10
United States v. Johnston, 268 U.S. 220 (1925)	10
Wade v. Mississippi Cooperative Extension Service, 528 F.2d 508 (5th Cir. 1976)	5
Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), cert. denied, 429 U.S. 861 (1976)	7

Statutes

Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*	*passim*
42 U.S.C. § 1981	1, 5

Regulations

29 C.F.R. § 1607	7
29 C.F.R. § 1607.16(Q)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1420

UNCLE BEN'S, INC.

Petitioner,

v.

THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Thomas Johnson, plaintiff-respondent (hereinafter "plaintiff"), brought this class action on March 28, 1974, alleging that Uncle Ben's, Inc. (hereinafter "Uncle Ben's" or "defendant") had discriminated against him and all similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* He sought injunctive, declaratory, and compensatory relief to redress Uncle Ben's discriminatory practices with respect to compensation, hiring, promotion, transfer, seniority, and other terms and conditions of employment.

On September 12, 1975, the district court determined that plaintiff could represent a class of all "black and Mexican-American persons who have been employed or are employed or may in the future be employed by Defendant Uncle Ben's, Inc." At the trial in October 1977, plaintiff and other Uncle Ben's employees described the working conditions and opportunities for minorities at Uncle Ben's. Plaintiff also presented expert statistical testimony by Dr. Richard Tapia that black employees received significantly fewer promotions than comparable white employees and that Mexican-Americans were significantly under-represented in defendant's work force when compared with their representation in the Houston area's labor force.

At the conclusion of plaintiff's direct case, defendant moved for dismissal of all allegations. The motion was granted as to all issues of Mexican-American employment and as to the compensation, hiring, transfer, seniority, and other employment terms and conditions of blacks. The court did find, however, that plaintiff had established a *prima facie* case of discrimination in the promotion of blacks.

Defendant called its personnel manager and three experts in an effort to rebut plaintiff's *prima facie* showing. These experts compared Uncle Ben's employment of blacks with the utilization of blacks in allegedly comparable Bureau of the Census job classifications within the Houston Standard Metropolitan Statistical Area (SMSA). One expert also analyzed promotion data for whites and blacks using very small job categories for his comparison. Defendant's expert also criticized Dr. Tapia for certain minor statistical errors. In rebuttal, plaintiff's statistician, Dr. Robert Thrall, testified that the small statistical sample used by defendant's experts was unreliable and that there were significant differences in promotion rates between whites and blacks when adequate samples were used.

At the conclusion of plaintiff's direct examination of his expert rebuttal witness but before defendant had been allowed to cross-examine, the district court ruled for the defendant from the bench. In a prepared oral statement, the court rejected all statistical analyses as irrelevant. It concluded that "any discrimination at Uncle Ben's has been color blind" and "without reference to race or other impermissible criterion." *See* Pet. App. C-2. Judge Sterling subsequently entered written findings of fact and conclusions, prefacing them with a reiteration of his oral denunciation of the use of statistics in an employment discrimination case. Final judgment was entered for the defendant on January 13, 1978.

The Fifth Circuit initially affirmed the district court's opinion *per curiam* on April 11, 1980. On rehearing, however, it modified and affirmed the district court's opinion in part and reversed in part and remanded. The Court affirmed the district court's dismissal of plaintiff's allegations of discrimination against Mexican-Americans but modified the court's judgment to find that dismissal to be without prejudice (Pet. App. A-8-9). The Court then held that the district court's "erroneous notion of the controlling legal principles regarding the use and role of statistics in an employment discrimination case" (Pet. App. A-5) compelled the appellate court's independent analysis of the record (Pet. App. A-7). The Fifth Circuit analyzed the district court's findings of fact within the context of the discriminatory impact theory of employment discrimination (Pet. App. A-11-14). It then found those findings inadequate because they failed to identify the relevant labor pool for promotions at Uncle Ben's and precluded the court from evaluating the discriminatory impact of the defendant's promotion practices (Pet. App. A-14). The Court therefore remanded the case for an assessment of the discriminatory impact based upon employment statistics that distinguished internal promotion from lateral hiring (Pet. App. A-15).

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY APPLIED THE DISPARATE IMPACT THEORY TO AN EMPLOYMENT PROMOTION SYSTEM IN WHICH SUBJECTIVE EVALUATIONS WERE COUPLED WITH PROMOTION CRITERIA THAT WERE FACIALLY NEUTRAL BUT RACIALLY DISCRIMINATORY IN EFFECT.

The Fifth Circuit's opinion follows long-established Supreme Court and Circuit Court precedent defining the elements required to prove a case of disparate racial impact in employment hiring and promotion. Knowing or intentional discrimination need not be shown in a disparate impact case (Pet. App. A-6). In order to establish a *prima facie* case, a plaintiff must demonstrate only that a facially-neutral employment qualification has a racially-discriminatory impact. The burden of proof then shifts to the defendant to demonstrate that the discriminatory procedure is required by business necessity or that there is a manifest relationship between the qualification and employment responsibilities. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 n.15 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

The promotion procedure at Uncle Ben's is a classic example of a system that is racially neutral in outline but significantly discriminatory in impact. Prior to May 1974 when this suit was filed (Pet. App. A-16-17), Uncle Ben's employees were passive members of a system by which personnel officers contacted employees that they considered potential applicants for promotion, and these applicants' qualifications were then evaluated by the candidate's present and prospective supervisors (almost all of whom were white) in conjunction with the personnel office. There were no specific guidelines to aid supervisors

in avoiding discriminatory decisions. Although Uncle Ben's began to post job vacancy notices for hourly jobs in 1974, about the time these proceedings began, the procedure of subjective supervisory evaluation continues unabated.

The Fifth Circuit noted that Uncle Ben's promotion system substantially embodied the mechanisms the Court had invalidated in *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972) (Pet. App. A-16). Although the foreman's recommendation is the "indispensible single most important factor in the promotion process," he is given no written instructions on proper evaluation of qualifications, and the standards articulated for judgment are vague and subjective. Hourly employees are not notified of promotion opportunities and qualifications, and there are no safeguards evident to prevent discrimination. *Id.* at 358-59. *See also Wade* v. *Mississippi Cooperative Extension Service*, 528 F.2d 508, 518 (5th Cir. 1976) (§ 1981 standard). Quite similar promotion systems were condemned as having discriminatory impact in *Swint* v. *Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979); *Robinson* v. *Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976), *modified*, 544 F.2d 1258, *cert. denied*, 434 U.S. 822 (1977).

The Fifth Circuit found that the central elements of a disparate impact in promotions case had been established but that additional evaluation of the evidence would be required for a proper assessment of the discriminatory effect. The Fifth Circuit did not merely assume that classwide claims automatically raise disparate impact issues, as Petitioner claims (Pet. 28-29). Rather, the Court of Appeals clearly articulated the similarity of

Uncle Ben's promotion system to the *Rowe* v. *General Motors Corp.* facially neutral but effectively discriminatory promotion system (Pet. App. A-16-17).[1] The Court noted that a promotion system based upon the use of unguided, subjective supervisory evaluations is a "ready mechanism for racial discrimination" despite the facial neutrality of the system (Pet. App. A-16, *citing Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1383 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *James* v. *Stockham Valves & Fittings Co.*, *supra*, 559 F. 2d at 345; *Rowe* v. *General Motors Corp.*, *supra*, 457 F.

---

[1] Petitioner's reference to the standards controlling disparate treatment cases is irrelevant (Pet. 23-29). It is true that some of the Fifth Circuit's language and citation in describing the use of statistics in establishing the fact of promotion discrimination might be used more appropriately in a case of disaparate treatment than in the instant disparate impact case. The opinion could be phrased more accurately in terms of the defendant's need to prove "business necessity" and a "manifest relationship" between promotion qualification and successful job performance than in terms of articulating "legitimate, nondiscriminatory reasons" for action (Pet. App. A-10-11). This brief instance of inexact dictum does not negate the opinion's clear holding, however, that Uncle Ben's employment practices must be evaluated under a disparate impact theory (Pet. App. A-13-14, 16-18).

The Supreme Court's recent reversal of a Fifth Circuit disparate treatment case in *Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214, 4215 n.5 (March 4, 1981), reiterated the different factual issues and evidentiary character in disparate impact cases. Any remand of the instant disparate impact case for reconsideration in light of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Burdine*, both disparate treatment cases, would needlessly confuse the courts that have thus far distinguished the substance and procedure of disparate treatment and impact litigation. *See McDonnell Douglas*, *supra*, 411 U.S. at 802 n.14; *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 336. The reversal of the *Burdine* case and its reference to the distinction between disparate impact and treatment theories have put the Fifth Circuit on notice of the need for clarity in defining the nature and procedures for the two distinct types of cases.

2d at 359). *See also Robinson* v. *Union Carbide Corp., supra,* 538 F.2d at 662; *Watkins* v. *Scott Paper Co.,* 530 F.2d 1159, 1189 and 1193 (5th Cir.), *cert. denied,* 429 U.S. 861 (1976); *Barnett* v. *W.T. Grant Co.,* 518 F.2d 543, 550 (4th Cir. 1975); *Nath* v. *General Electric Co.,* 438 F. Supp. 213, 220 (E.D. Pa. 1977), *aff'd,* 594 F.2d 855 (3d Cir. 1979). Such a selection procedure, although informal, casual, and unstructured, must satisfy the business necessity test if it creates a disparate impact. *See* the Equal Employment Opportunities Commission's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.16(Q) (1978). Furthermore, the Court noted that Uncle Ben's educational requirements could cause a disparate impact on blacks and would be lawful only if required by "business necessity" and validated under the Equal Employment Opportunities Commission's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978).[2] The Court found that such requirements are not a "measure of probable performance for many jobs at Uncle Ben's" (Pet. App. A-17-18, *citing Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431; *Payne* v. *Travenol Laboratories, Inc.,* 565 F.2d 895, 899-900 (5th Cir.), *cert. denied,* 439 U.S. 835 (1978)).

The Fifth Circuit correctly held that discriminatory subjective evaluations and unvalidated selection procedures are unlawful if they are part of a promotion system that has disparate racial impact. *See* Pet. App. A-16-

---

[2] Many courts have observed that the EEOC guidelines are entitled to "great deference" when identifying the validation techniques sufficient to prove that an educational requirement is a business necessity. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 431 (1975); *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434; *Guardians Ass'n. of New York City* v. *Civil Serv.,* 630 F.2d 79, 91 (2d Cir. 1980); *James* v. *Stockham Valves & Fittings Co., supra,* 559 F.2d at 337.

17. It is the definition of the disparate impact itself that led the Fifth Circuit to remand the instant case to the district court for additional evidence (Pet. App. A-15). The district court did not evaluate the proportion of black applicants denied promotions, and the Court of Appeals could not do so because the relevant labor pool was insufficiently identified (Pet. App. A-13-16). The Fifth Circuit's direction to the district court to assess disparate impact using the proper standard and then to judge the procedures that create the disparity comports with the settled legal standards for a disparate impact Title VII case. The issues the district court has been asked to resolve are purely factual matters and are inappropriate for resolution by an appellate court.

II. THE FIFTH CIRCUIT CORRECTLY IDENTIFIED THE DISTRICT COURT'S ERRORS IN APPLYING CONTROLLING LEGAL PRINCIPLES REGARDING THE ROLE OF STATISTICS IN AN EMPLOYMENT DISCRIMINATION CASE.

The Fifth Circuit correctly held that statistics on a defendant's work force serve an important role in judging employment discrimination cases and that gross statistical disparities may alone constitute *prima facie* proof in such cases (Pet. App. A-6, *citing International Brotherhood of Teamsters v. United States, supra,* 431 U.S. at 339; *Hazelwood School District* v. *United States,* 433 U.S. 299, 307-08 (1977); *Fisher* v. *Procter & Gamble Manufacturing Co.,* 613 F.2d 527, 543-44 (5th Cir. 1980) (U.S. appeal pending)). *See also Swint* v. *Pullman-Standard, supra,* 624 F.2d at 529; *Rowe* v. *General Motors Corp., supra,* 457 F.2d at 357-58. The Court also correctly held that the district court in the instant case applied an erroneous notion of the controlling law on the use of statistics (Pet. App. A-5).

At the conclusion of plaintiff's direct examination of his expert rebuttal witness, District Judge Sterling ruled for the defendant from the bench. His statement rejected all statistical evidence as irrelevant:

> If we accept the plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance. We are not here to enforce a law which says that things must occur within the limits of a mathematical probability. The law says the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability.

(Pet. App. C-2). He concluded that "any discrimination at Uncle Ben's has been color blind" and "without reference to race or other impermissible criterion" (Pet. App. C-2).

Although Judge Sterling subsequently filed highly conclusory findings of fact and law that alluded to the statistical evidence, these findings were prefaced with the admonition that "reference in these findings of fact concerning statistical significance should not be taken as a dilution of what was announced from the bench as the basis for decision at the end of the evidence" (Pet. App. C-1). The court's clear assumption that plaintiff must prove knowing, intentional discrimination to prevail and that a "color blind" policy cannot violate Title VII regardless of its impact contravenes the established principles of the disparate impact Title VII case. This incorrect premise tainted all of the district court's findings and required the Fifth Circuit's reversal.

The district court's findings were, in fact, little more than judicial repetition of the defendant's proposed findings. Of nineteen findings made by the district court, seventeen were taken verbatim from the defendant's proposals and the remaining two reflected only minor modi-

fications. Where a court makes "no analysis of the statistical information or the weight to be accorded it . . . [and] there is, as here, an absence of a critical review of the relevant facts culminating in a coherent body of factual findings which is particularly called for in a discrimination case," the appellate court must make an independent review of the facts free of the "clearly erroneous" rule. *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *EEOC* v. *United Virginia Bank/Seaboard National*, 555 F.2d 403 (4th Cir. 1977). This independent review of the facts is particularly warranted where the district court's findings were stated in terms of ultimate facts such that the appellate court would be compelled to make its own findings of subsidiary facts. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, *supra*, 575 F.2d at 1383. *Accord*, *James* v. *Stockham Valves & Fittings Co.*, *supra*, 559 F.2d at 314.

Much of petitioner's argument to support the issuance of a writ of certiorari debates the specificity and adequacy of the district court's evaluation of the plaintiff's statistics (Pet. 15-18), yet the factual adequacy of the case is precisely the issue remanded for decision by the Fifth Circuit (Pet. App. A-14-15). The Court of Appeals has not rendered an independent judgment of the plaintiff's allegation of disparate impact; rather, it has instructed the lower court to categorize the statistics that are relevant under controlling legal principles in order to determine whether disparate impact has been established. It is precisely this sort of evidentiary issue that is appropriate for a trial court, and not for the nation's highest appellate court.[3]

---

[3] *See, e.g., United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *United States* v. *County of Fairfax, Va.*, 629 F.2d 932, 943 (4th Cir. 1980) (remand, because "with these legal cri-

III. THE FIFTH CIRCUIT CORRECTLY REMANDED JUDGMENT TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONSIDER ADDITIONAL EVIDENCE IN ORDER TO DETERMINE WHETHER INTERNAL WORKFORCE DATA OR EXTERNAL LABOR MARKET DATA ACCURATELY DEFINES THE RELEVANT LABOR POOL.

Far from embracing the theory that "a *prima facie* case of promotion discrimination can be established through static workforce data showing that as of a particular date the percentage representation of a protected class in upper level positions differs from that group's percentage representation in lower level positions" (Pet. 18), the Fifth Circuit actually held that evaluation of the plaintiff's case was impossible until the district court determined "whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions" (Pet. App. A-14). The Court of Appeals did indeed assert that internal workforce statistics would be controlling for evaluation of any disparate impact for jobs filled by promotion from within (Pet. App. A-14). The Court also asserted that static workforce figures would be "inapplicable" if "vacant positions ordinarily are filled by lateral hires or hiring from among graduates or relevant educational programs" (Pet. App. A-14). The district court's findings were "useless," not because they relied upon external labor market figures but because they "commingle[d] facts about lateral hiring" with facts about promotion from within (Pet. App. A-14). Again, the resolution of this factual confusion is a matter to be decided on remand by the district court, the proper forum for this kind of evidentiary review.

---

teria as a guide, we think that the initial exploration of the factual mazes of the disparate impact case should be undertaken by the district court and not by us").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JERRY D. ANKER
RANDALL L. SPECK
SUE M. BRIGGUM
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Respondent,
Thomas Johnson

Of Counsel:

CAROLE NELKIN
NELKIN & NELKIN
5417 Chaucer
P.O. Box 25303
Houston, Texas 77005